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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	A1505014

APPLICATION FOR REHEARING OF DECISION 16-09-002

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TABLE OF CONTENTS

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I. Jurisdiction for Application for Rehearing

James L. Duncan, a party of record in California Public Utilities Commission (CPUC) proceeding A15-05-014[1] (A1505014), respectfully applies pursuant to Public Utilities Code §§ 1731, 1732, 1736,[2] and CPUC Rules of Practice and Procedure[3] Rule 16.1 for rehearing of CPUC Decision 16-09-002 (Decision),[4] issued September 20, 2016.

II. Introduction

The Decision was issued regarding the City of Santa Rosa's (City) Application, A1505014, (Proceeding) for an at-grade rail crossing at Jennings Avenue (Jennings crossing) on a publicly owned and governed rail line in the SMART transit district. An overarching jurisdictional dispute in the Proceeding was whether the CPUC had, by law, exclusive jurisdiction over the Jennings crossing to determine if a crossing could be located there, whether a crossing could be built at all and, if so, whether it could be built at-grade or must be grade-separated. Duncan disputed the CPUC's claim of exclusive jurisdiction over the Jennings crossing and cited statutory and case law indicating that the scope of the CPUC's lawful jurisdiction over the

[1] Response of James L. Duncan in support of City of Santa Rosa Application A1505014, June 15, 2015.
[2] All following Code citations are to the Public Utilities Code unless indicated otherwise.
[3] All following Rule citations are to the CPUC Rules of Practice and Procedure unless indicated otherwise.
[4] All following references or citations to the Decision will be to Decision 16-09-002 unless indicated otherwise.

Jennings crossing was limited to approval of objective standards of crossing design and the provision of safety appliances, such as gates and signals. The Decision did not resolve the jurisdictional dispute.

The jurisdictional dispute centers on statutory interpretation of Public Utilities Code §§ 229, 1201, 1202, and 99152, as well as on CPUC General Order 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings, and CPUC Rule Section 3.7(c). Duncan relies on the paramount appellate court cases defining CPUC jurisdiction over public agencies: *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154 (*Inyo*) and *Monterey Peninsula Water Management District v Public Utilities Commission of the State of California* (2016) 62 Cal.4th 693 (*Monterey Peninsula Water*). Duncan further relies especially on the paramount appellate court case defining CPUC jurisdiction over transit districts, *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346 (*Santa Clara*). Duncan contends that the overarching controlling law established by these cases holds that the CPUC has no authority to regulate public agencies, including transit districts, absent express statutory authorization of such regulation.

Under this controlling law, § 229 is without relevance because it is only a general definition of "Railroad" and does not expressly grant the CPUC any jurisdiction over transit districts. *Santa Clara* holds that the CPUC does not have jurisdiction pursuant to§§1201 and 1202 in transit districts. Section 99152 does grant the CPUC limited jurisdiction over safety appliances and procedures in public transit guideways and does apply to SMART, and the CPUC itself has provided a definition of its limited jurisdiction over "safety appliances and procedures" pursuant to § 99152: "Our jurisdiction over safety extends to the entire system, including safety appliances and procedures. Appliances are devices, such as equipment and machinery. Procedures are the courses of action that define operations. Thus, our jurisdiction over safety includes both the plant (equipment and machinery) and operations that constitute the system." *Brown v. Santa Clara Valley Transportation Agency* (1994) Cal. PUC LEXIS 716; 56 CPUC2d 554, 556.

Duncan contends that CPUC General Order 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings, and CPUC Rule Section 3.7(c) are based on §§1201 and 1202 and are not applicable to the Jennings crossing which is in a transit district. As a matter of law, even if CPUC General Order 75-D, paragraph 2, were applicable, the CPUC's interpretation produces absurd results. Furthermore, as a matter of law, the CPUC's interpretation of CPUC General Order 75-D, paragraph 2, impermissibly alters or effectively amends or enlarges or impairs the scope of any possible statutory basis and as such is void.

The actions of the CPUC in excess of its jurisdiction regarding the City's Application have caused a costly delay in improving the Jennings crossing and have been the cause of its unnecessary lengthy closure which injured Duncan and the general public due to the loss of a long-established, convenient, and safe public thoroughfare for pedestrians and bicyclists.

This application for rehearing also challenges revisions made less than two days before the Commission Voting Meeting at which the Decision was adopted. These revisions actually changed the original proposed decision to an "alternate proposed decision" and as such required an additional 30-day review and comment period. (CPUC Rule 14.1(d), § 311 (e).) Nevertheless, the Decision was adopted by the Commission without the additional 30-day review period.

The specific statutory grounds for appellate review are: § 1757 (a) (1) The commission acted without, or in excess of, its powers or jurisdiction; § 1757 (a) (2) The commission has not proceeded in the manner required by law; § 1757 (a) (5) The order or decision of the commission ... was an abuse of discretion.

III. Background and Jurisdictional Dispute

Jennings crossing is an historical crossing[5] located in the City of Santa Rosa on a publicly owned and governed rail line located in the SMART transit district. SMART is a transit district approved by the Legislature.[6] In September 2011, the City first contacted the CPUC regarding approval of the Jennings rail crossing as an at-grade crossing. In January 2012, the CPUC responded, asserting exclusive jurisdiction over the Jennings crossing, and citing General Order 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings called for the City, as a matter of CPUC policy, to close one or more unrelated, existing, safe, at-grade rail crossings in conjunction with the improvement of the Jennings crossing as an at-grade crossing [7] The City prepared an Environmental Impact Report (EIR) which studied the Jennings crossing and the closure of other crossings. The City also applied for and received tentative approval of a grant towards the cost of construction of a possible overcrossing at Jennings.[8]

During the preparation of the EIR, and at a time when there was a possibility that one or more unrelated rail crossings in Santa Rosa would be closed, City staff held preliminary discussions with CPUC staff regarding construction of an at-grade rail crossing at Jennings. These discussions addressed crossing safety with specific warning devices that would be in compliance with applicable state and federal standards and regulations[9] and also included the specific design features the CPUC would require for approval.[10] The City's Draft Environmental Report noted these discussions and stated that because of conformance to the CPUS's stated safety standards "potential safety hazards would be less than significant".[11]

[5] See Opening Issue Brief, filed April 15, 2016, by James L. Duncan (Duncan's Opening Issue Brief) p. 2.
[6] See Opening Brief on Jurisdictional Issues, filed on December 28, 2015, by James L. Duncan (Duncan's Opening Brief), pp. 3-4.
[7] See Exhibit 1 in Response of James L. Duncan, filed on June 12, 2015 (Duncan's Response)
[8] Santa Rosa likely to get $8,2 million grant for Jennings Avenue railroad crossing, *Santa Rosa Press Democrat*, September 8, 2014.
[9] Jennings Avenue Pedestrian and Bicycle Rail Crossing Project, Draft EIR, Preferred Project -- At-grade Rail Crossing, pp. 3-12.22 & 3-12.23.
[10] Transcript, Evidentiary Hearing, March 14, 2016, p.214, lines 3-25.
[11] Jennings Draft EIR, *supra*, pp. 3-12.22 & 3-12.23.

The City subsequently decided seek approval to improve the Jennings crossing at-grade and allowed the grant to lapse. On December 22, 2014, the CPUC sent a letter to the City regarding the Jennings crossing, which again cited GO 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings and additionally stated, "In Commission Rules of Practice and Procedure, Section 3.7(c), applications to construct a new at-grade crossing must include the following: (1) a statement showing the public need to be served by the proposed crossing; (2) a statement showing why a separation of grades is not practicable; ... ."[12]

On May 7, 2015, the City applied to the CPUC for approval of the Jennings crossing as an at-grade crossing without closures of any other crossings. The City's Application was made pursuant to Rule 3.7 and §§ 1201-1205.[13] The Safety and Enforcement Division (SED) of the CPUC filed a Protest (SED's Protest), again asserting exclusive jurisdiction over the Jennings crossing and requiring either construction of an overcrossing at Jennings or crossing closures elsewhere. SED's Protest also asserted the City was not in compliance with Rule 3.7 (c) (2).[14] Later in the course of the Proceeding, SED described the CPUC's requirement for either grade separation or unrelated crossing closure as an aspect of an unwritten CPUC policy imposing a state-wide freeze on the number of at-grade rail crossings.[15]

On June 15, 2015, James L. Duncan became a party in this case by filing a Response in Support of the City's Application (Response). Duncan cited *Santa Clara* as authority that: §§ 1201 and 1202 did not apply to the SMART transit district; CPUC jurisdiction is limited to regulation of privately owned public utilities; and the CPUC has no jurisdiction over publicly owned public utilities unless expressly provided by statute.[16] Duncan discussed that, in the absence of an express grant of statutory authority to the CPUC, the type of rail vehicles used in a transit district were not legally relevant to CPUC jurisdiction in transit districts.[17] Duncan discussed that, in

[12] CPUC letter to City, December 22, 2014, Exhibit 2 in Duncan's Response.

[13] Application of the City of Santa Rosa, at pp. 1-2.
[14] Protest of the Safety and Enforcement Division, filed June 4, 2016, pp. 2-3.
[15] Transcript, Evidentiary Hearing, March 14, 2016, p. 178, lines 19-28 and p. 179, lines 1-12.
[16] Duncan's Response, pp. 1-5.
[17] Duncan's Response, pp. 5-7.

view of the *Santa Clara* court's holding, the CPUC had no jurisdiction to enforce GO 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings, or Rule 3.7 (c).[18] Duncan discussed that CPUC General Orders 143-B and 164-D, provisions regarding rail crossings, were by their own definitions not applicable to the SMART transit district.[19] Duncan cited § 99152, which provides the CPUC with only limited jurisdiction over SMART as to "safety appliances and procedures". Duncan cited a CPUC publication which compiled the standards for designs and devices used at California pedestrian and bicycle rail crossings as examples of standards consistent with § 99152. Duncan concluded by requesting that the CPUC approve the City's Application within the limited scope of its § 99152 jurisdiction.[20]

Between the middle of August 2015, and the first week of December 2015, the Proceeding was mediated unsuccessfully in the CPUC's Alternate Dispute Resolution program. On December 7, 2015, the City filed a Motion to Limit the Scope of the Proceeding to remove SED's demand that an unrelated rail crossing be closed in exchange for approval of the City's Application for the Jennings crossing. The City's motion was essentially based on a stipulation between the City and SED to remove from consideration the issue of closing any other crossing(s).
On December 7, 2015, Duncan filed a Motion for Interim Ruling on Jurisdictional Issues. On December 11, 2015, Duncan's motion was granted "as a legal issue that can be addressed without the need of testimony or hearings" and a briefing schedule was set.[21]

On December 22, 2015, Duncan filed a Response in opposition to the City's Motion to Limit the Scope of the Proceedings. Duncan's Response to the City's Motion, pp. 2-3, argued that the CPUC's assertion of jurisdiction to close existing crossings was a matter of considerable continuing public interest. In light of the unnecessary public expense and delay caused by the CPUC's crossing closure requirement and the pending jurisdictional issues, the City's motion could forestall review of the underlying issues.

[18] Duncan's Response, pp. 7-9.
[19] Duncan's Response, pp. 9-10.
[20] Duncan's Response, pp. 10-11.
[21] Scoping Memo, December 11, 2015, p. 5.

On December 28, 2015, Duncan filed an Opening Brief on Jurisdictional Issues (Duncan's Opening Brief) which provided citations to authority and discussion on the following points:

1) §§ 1201 and 1202 grant the CPUC express exclusive jurisdiction over the placement, construction, and grade separation of rail crossings in privately owned railroads, but do not apply to transit districts. (p. 1.)
2) § 99152 applies to all public rail transit, including SMART, granting the CPUC limited ministerial jurisdiction only over safety appliances and procedures but not over placement, construction, and grade separation of rail crossings. (p. 1.)
3) Under Santa *Clara*, all law based on §§ 1201 and 1202 is inapplicable to rail crossings in transit districts. (p. 3.)
4) §§ 1201-1205 grant the CPUC jurisdiction only over privately owned railroads; SMART is a transit district, a public agency which is publicly owned and governed. (p. 3.)
5) The CPUC has no jurisdiction over publicly owned transit districts, such as SMART, except as expressly provided by statute. (p. 4.)
6) SMART's enabling legislation makes no reference to the CPUC and does not grant the CPUC any express jurisdiction over SMART. (p. 4.)
7) The *Santa Clara* court could not discern any legislative intent to impose the CPUC's §§ 1201 and 1202 exclusive jurisdiction on transit districts. (p. 5.)
8) The holding of the *Santa Clara* court provides guidance on the issue of the CPUC's jurisdiction over all transit districts. (p. 5.)
9) The statutes which authorize SMART and all transit districts in the state form a statutory scheme within the Public Utilities Code. (p. 6.)
10) The statutory scheme for transit districts grants them broad authority over the design, location, and construction, including grade separation, of their rail transit systems. (p. 6.)
11) The CPUC's own attorneys state that the CPUC has no jurisdiction under §§ 1201 and 1202 because they do not apply to transit districts. (p. 7.)
12) The CPUC has jurisdiction over transit districts only to the extent expressly provided by statute; the specific type of rail vehicle operated by or in a transit district is irrelevant to the scope of CPUC jurisdiction. (p. 7.)

13) Claims that the CPUC has jurisdiction over transit districts based on the type of rail vehicle operated are contrary to the very broad statutory authority transit districts have over the rail vehicles they operate. (p. 8.)
14) SMART's consideration and selection of its rail vehicles illustrates the very broad discretion of transit districts in selecting rail vehicles. (p. 8.)
15) The CPUC has no statutory jurisdiction in the SMART transit district to enforce General Order 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings. (p. 9.)
16) *City of San Mateo v. The Railroad Commission* does not provide authority to the CPUC to close rail crossings or require a separation of grade in transit districts; case law based on §§ 1201 and 1202 jurisdiction over privately owned railroads is not applicable to transit districts. (p. 11.)
17) CPUC Rule 3.7(c) is expressly based on §§ 1201 and 1202 which do not apply to transit districts such as SMART. Consequently, the CPUC has no statutory jurisdiction to enforce Rule 3.7(c) in the SMART transit district, nor can any showing of public need or impracticability of a separated grade for crossings be required. (p. 11.)
18) No statute expressly grants the CPUC any jurisdiction over rail crossings in the SMART transit district because of the freight rail service provided by the North Coast Railroad Authority, a publicly owned and governed public agency. (p. 12.)
19) The CPUC has limited jurisdiction pursuant to § 99152 relating to safety appliances and procedures over SMART and all public rail transit. (p. 13.)
20) CPUC General Orders 143-B and 164-D are based on § 99152 but by the definitions given in those orders are not applicable to SMART. (p. 14.)

On December 28, 2015, SED and the City[22]also concurrently filed Opening Briefs in opposition to Duncan's Opening Brief. The other parties in this case, Western Farm Center, Inc.,[23] Sonoma

[22] City's outside attorney acted in concert with SED's attorney in presentation of briefs with functionally similar arguments for CPUC jurisdiction to deny City's Application on Section 1201 and 1202 grounds. Outside attorney's firm correctly cited *Santa Clara* in pending California Supreme Court case but outside attorney argued against the identical holding in this case (See Duncan's Reply Brief on Jurisdictional Issues, filed January 11, 2016, (Duncan's Reply Brief), p. 8; also see Duncan's Rebuttal Brief on Jurisdictional issues, filed January 14, 2016 (Duncan's Rebuttal Brief) at p. 4.) *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal. 4th 1135, 1147, [it is a conflict of interest when an attorney represents parties whose interests are directly adverse in the same litigation]
[23] Response of Western Farm Center, Inc., filed June 17, 2015.

County Transportation and Land Use Coalition (SCTLC), Sierra Club, Friends of SMART (FOS), and Stephen G. Birdlebough[24] did not participate in the dispute over the scope of the CPUC's jurisdiction over rail crossings.

SED and the City contended, in their Opening Briefs, that Duncan incorrectly claimed that the CPUC had no jurisdiction over the Jennings crossing.[25] To support this contention, SED and the City quoted Duncan's Response which expressly acknowledged that there is CPUC jurisdiction over transit districts under § 99152. [26] (There is nothing in the record that Duncan ever claimed that the CPUC had no jurisdiction in transit districts, rather, Duncan cited the CPUC's limited jurisdiction in transit districts pursuant to § 99152.) Both SED and the City conceded, in their Opening Briefs, that §§ 1201 and 1202 do not apply to transit districts.[27]

On January 11, 2016, Duncan and the City filed Reply Briefs on the jurisdictional issues (Duncan's Reply Brief, City's Reply Brief). SED did not file a Reply Brief.

On January 14, 2016, Duncan, the City, and SED filed Rebuttal Briefs on the jurisdictional issues (Duncan's Rebuttal Brief, City's Rebuttal Brief, SED's Rebuttal Brief).[28]

In their briefing on Duncan's Motion for an Interim Ruling on Jurisdictional Issues, both SED and the City submitted a flurry of contentions focused on distinguishing *Santa Clara* and establishing CPUC jurisdiction pursuant to §§ 1201, 1202, and 229, over the Jennings crossing. None of these contentions directly disputed the points in Duncan's Opening, Reply, and Rebuttal Briefs. SED and the City contended that *Santa Clara* can be distinguished and is inapplicable because:

1) SMART is "heavy-rail" and *Santa Clara* involved "light-rail". [29]

[24] Response of Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of SMART and Stephen G. Birdlebough, filed June 16, 2015.
[25] SED's Opening Brief on Jurisdictional Issues, filed December 28, 2015 (SED's Opening Brief) at p. 1; City's Opening Brief on Jurisdictional Issues, filed .December 28, 2015 (City's Opening Brief) at pp. 1-2.
[26] SED's Opening Brief at pp. 1-2; City's Opening Brief, pp. 5-6.
[27] SED's Opening Brief at p 2; City's Opening Brief, p. 5.
[28] Because the CPUC utilizes expedited briefing with concurrent submission of briefs, responses to opposing parties is generally stated in the following round of concurrent briefs.
[29] City's Opening Brief, pp. 2, 3, 6. City's Reply Brief at p. 4,

2) SMART is a "railroad" and is a "railroad" as defined by section § 229.[30]
3) The freight trains of the NCRA use the SMART tracks.[31]
4) The NCRA's operator, the NWP is privately owned.[32]
5) The NWP is a "railroad corporation" and consequently crossings in the SMART transit district are subject to §§ 1201 and 1202.[33]
6) The *Santa Clara* court did not consider §§1201, 1202, 99152, and 229 "together".[34]
7) The *Santa Clara* court did not consider the scope of the CPUC's jurisdiction over transit districts other than in the context of the specific applicability of §§ 1201 and 1202 to the VTA.[35]
8) §§ 1201, 1202, 99152, and 229 "read together" gives the CPUC jurisdiction in transit districts that is functionally identical to that in privately owned railroads subject to §§ 1201 and 1202.[36]
9) The CPUC's safety oversight jurisdiction pursuant to § 99152 grants the CPUC authority in transit districts that is functionally identical to that in privately owned railroads subject to §§ 1201 and 1202.[37]
10) SED conceded that § 99152 does not provide CPUC with "exclusive jurisdiction" over Jennings crossing but also asserts that the *Santa Clara* court's decision "begs the question" of how the CPUC's authority over rail crossings under § 99152 and under §§ 1201, 1202 are different.[38, 39]

There are several points regarding the City's assertion, noted above, that SMART is "heavy-rail" and *Santa Clara* involved "light-rail". As discussed before, no citations have been provided to any relevant official definition of "heavy rail" nor to any statute which provides the CPUC

[30] SED's Opening Brief at pp. 1, 3. City's Opening Brief, pp. 5, 6. City's Reply Brief, pp. 4, City's Rebuttal Brief, pp. 3, 4.
[31] City's Opening Brief, pp. 2, 3, 4, 5. SED's Rebuttal Brief, p. 8. City's Rebuttal Brief, pp. 3. 4.
[32] City's Opening Brief, pp. 4, 5. SED's Rebuttal Brief, p. 8. City's Rebuttal Brief, pp. 3, 4.
[33] City's Opening Brief, pp. 3, 5, 6. City's Rebuttal Brief, pp. 3, 4.
[34] City's Opening Brief, pp. 5, 6. City's Rebuttal Brief, pp. 3, 4.
[35] See City's Rebuttal Brief, pp. 3, 5.
[36] SED's Opening Brief, p. 3. City's Opening Brief, pp. 5, 6. City's Rebuttal Brief, p. 4.
[37] SED's Opening Brief, p. 3. City's Opening Brief, pp. 5, 6. SED's Rebuttal Brief, p. 8.
[38] SED's Rebuttal Brief, p. 8.
[39] Transcript, Prehearing Conference, January 15, 2016, p. 30, lines 3-24. Duncan's request to be able to respond to new material raised in SED's Rebuttal Brief was denied by ALJ.

jurisdiction over SMART based upon the operation of a specific type of rail vehicle.[40] It is erroneous to assert that the *Santa Clara* holding limiting the scope of CPUC jurisdiction is inapplicable because of the existing freight train traffic at the Jennings crossing: Decisions published by the CPUC establish that there was also existing freight train traffic at the rail crossing which was in dispute in *Santa Clara.* Furthermore, the factual backgrounds of the disputed rail crossing in *Santa Clara* and the Jennings crossing are substantially similar.[41] The type of trains in service in the VTA transit district were not relevant to the holding in *Santa Clara,* which involved matters of law regarding statutory interpretation of jurisdiction and not determinations of fact about types of trains or the history of the rail line in the transit districts.[42]

The City and SED's claim, noted above, that SMART is a "railroad" as defined by section § 229 is irrelevant to any issue regarding CPUC jurisdiction. Section 229 is simply a general definition of "Railroad" and, as discussed before, this same basic issue was raised and rejected in *Santa Clara* regarding § 231, the general definition of "street railroad". The definition of "Railroad" in § 229 and the definition of "Street Railroad" in § 231 do not expressly grant the CPUC any specific jurisdiction, nor are they expressly linked to §§ 1201 and 1202. Further, neither SED nor the City provided any discussion or citations to authority regarding their § 229 claims.[43] As discussed before, the Supreme Court in *Monterey Peninsula Water* recently overturned a similar assertion of CPUC jurisdiction over a public agency. The CPUC's assertion of jurisdiction was based upon a statute that did not provide the CPUC with express authority.[44]

The City and SED's claims, noted above, that this case is distinguishable from *Santa Clara* because the freight trains of the NCRA use the SMART tracks and because the NCRA's operator, the Northwestern Pacific Railroad (NWP), is privately owned have been extensively discussed in Duncan's Briefs. The North Coast Railroad Authority (NCRA) was established by the Legislature in 1989 to ensure continuing passenger and freight rail service to the North Coast

[40] Duncan's Opening Brief, pp. 7-8. Duncan's Reply Brief, p. 10. Reply Issue Brief, filed April 29, 2016, by James L. Duncan (Duncan's Reply Issue Brief), p. 11.
[41] Opening Issue Brief, filed April 15, 2016, by James L. Duncan (Duncan's Opening Issue Brief), pp. 1-3.
[42] *Santa Clara* at pp.355-356.
[43] Duncan's Reply Brief, p. 6. Duncan's Rebuttal Brief,1-3.
[44] Duncan's Opening Issue Brief, discussion of § 229 in light of holding in *Monterey Peninsula Water*, p. 5-6.

area. (Government Code §§ 93000, *et seq.*) NCRA exercises policy and oversight authority and the freight rail service is operated by a qualified and experienced private entity. (Government Code §§ 93020(d) and (f); also see §§ 93023(b),(c), and (d).) The NCRA has a perpetual and exclusive easement to operate freight rail service on the SMART-owned rail line. The NCRA is a public agency. When review of pertinent legislation reveals no statute which expressly provides the CPUC with specific jurisdiction, there can be no basis for inferring legislative intent to subject a public agency to such regulation (*County of Inyo v Public Utilities Commission* (1980) 26 Cal.3d 154, 164-165). No statute has been cited which provides the CPUC with the necessary express jurisdiction over the rail crossings in the SMART transit district based upon the NCRA's exercise of its perpetual and exclusive easement to operate freight rail service on the SMART-owned rail line.[45]

As previously discussed in Duncan's briefs, as noted above, the City makes a novel claim to the effect that the NWP is a "railroad corporation" and consequently crossings in the SMART transit district are subject to §§ 1201 and 1202. The NCRA is authorized by statute to select a public or private entity to operate a rail transportation system but that entity has no status to operate freight or passenger train service independent of the public agency governance of the NCRA or of SMART.[46] Nevertheless, the gist of the City's argument here appears to be that a public agency which employs a private entity to provide it with a service is subject to regulation by the CPUC as if it were itself a private entity.[47] The California Supreme Court in *Monterey Peninsula Water* considered the CPUC's assertion of jurisdiction over a water management district because fees charged by the district were being collected by a private company with no additional charge or expense to the public. The *Monterey Peninsula Water* court held that neither the California Constitution nor any statute granted the CPUC jurisdiction over the fees of public agencies. [48]

[45] Duncan's Opening Brief, pp. 2-13. Duncan's Reply Brief, p. 7.
[46] Duncan's Opening Issue Brief, p. 7.
[47] Duncan's Reply Brief, p. 8.
[48] Duncan's Opening Issue Brief, pp. 4-6.

As noted previously, transit districts have very broad statutory authority over the types of rail vehicles they operate. SMART's consideration and selection of its trains exemplifies this broad discretion over the types of rail vehicles.[49]

As noted above, the City asserted that the *Santa Clara* court did not consider §§1201, 1202, 99152, and 229 "together". However, as Duncan discussed in detail, the statements of the CPUC's own attorneys in the appellate briefs regarding *Santa Clara* confirm that the *Santa Clara* court did extensively consider §§1201, 1202, and 99152.[50] The *Santa Clara* court would not have considered § 229 because it was not alleged that the VTA's trains were "Railroad" trains. But the *Santa Clara* court did consider § 231, which defines "Street Railroads", and held "While the VTA arguably could be considered to be operating a 'street railroad' it is a 'public agency', not a 'person' and arguably not a 'corporation.'" (*Santa Clara* at pp. 361-362.) Duncan's Opening Brief , p. 3, made many of these same points.

As noted above, the City claims that the *Santa Clara* court did not consider the scope of the CPUC's jurisdiction over transit districts other than in the context of the specific applicability of §§ 1201 and 1202 to the VTA. However, as discussed in Duncan's Opening Brief, pp. 5-6, due to the particular circumstances of the case, the *Santa Clara* court could have found the case moot, but chose instead to exercise its discretion to "resolve this jurisdictional dispute since it is a matter of continuing public importance and the issue is likely to recur with respect to ... other public entities ... throughout the state." (*Santa Clara* at p. 355.) Throughout the *Santa Clara* court's opinion, the court referred to "transit districts" in the plural. As the *Santa Clara* court noted, "The VTA, like all transit districts in the state, is a public district organized pursuant to state law and designated as a transit district in its enabling legislation. (See §§ 99213, 100001.)" (*Id*. p. 357.) The *Santa Clara* case did not involve resolution of any disputed factual issues that were particular to the VTA. Rather, the "[*Santa Clara*] case turns on statutory interpretation and issues of legislative intent underlying sections 1201 and 1202 as well as the VTA's enabling legislation and related statutes applicable to public light rail transit systems. Therefore our review is independent review." (*Santa Clara* at p. 359.)

[49] Duncan's Opening Brief, pp. 8-9.
[50] Duncan's Reply Brief, pp. 1-2, 6-7, Endnotes 1, 2, 3, 4, 5, 6, 9, 10, 11, 14.

As noted above, SED and City assert that §§ 1201, 1202, 99152, and 229 "read together" provides the CPUC with jurisdiction in transit districts that is functionally identical to that in privately owned railroads subject to §§ 1201 and 1202. As Duncan's briefs discussed, *Santa Clara* holds that §§ 1201 and 1202 are not applicable to transit districts.[51] The CPUC's own attorneys expressly acknowledge that §§ 1201 and 1202 are not applicable to transit districts.[52] SED's attorney also expressly acknowledges that §§ 1201 and 1202 are not applicable to transit districts.[53] The CPUC has limited jurisdiction pursuant to § 99152 over safety appliances and procedures over SMART and all public rail transit.[54] As discussed above, § 229 is only a general definition of "Railroad" .The jurisdictional dispute is the scope of the CPUC's jurisdiction in transit districts. Only § 99152 provides the CPUC with an express grant of limited jurisdiction in transit districts and cannot be "read together" with §§ 1201 and 1202 which have been held not to apply to transit districts.

As noted above, SED and City assert that the CPUC's safety oversight jurisdiction pursuant to § 99152 grants the CPUC authority in transit districts that is functionally identical to that in privately owned railroads subject to §§ 1201 and 1202. As previously discussed, a key issue is whether § 99152 grants the CPUC broad exclusive discretionary authority over the location, construction, design, and specifically the grade separation of rail crossings in transit districts or only a limited ministerial authority over safety appliances and procedures. The statements of the CPUC's own attorneys in appellate briefs in *Santa Clara* establish that this issue was argued in *Santa Clara* and determined against the CPUC.[55] In this case, SED conceded § 99152 does not provide CPUC with "exclusive jurisdiction" over Jennings crossing but also asserted that the *Santa Clara* court's decision "begs the question" of how the CPUC's authority over rail crossings under § 99152 and under §§ 1201, 1202 are different. [56] The CPUC itself has provided the answer to that question "Our jurisdiction [pursuant to § 99152] over safety extends to the entire system, including safety appliances and procedures. Appliances are devices, such as equipment and machinery. Procedures are the courses of action that define operations. Thus, our

[51] Duncan's Opening Brief, pp. 1-7. Duncan's Rebuttal Brief, p. 5.
[52] Duncan's Opening Brief, p. 7.
[53] SED's Opening Brief, p. 2.
[54] Duncan's Opening Brief, p. 13.
[55] Duncan's Reply Brief, p. 1, 2. Endnotes 1, 2, 3, 4, 5, 6, 10, 11, 12, 16.
[56] SED's Rebuttal Brief, p. 8.

jurisdiction [in transit districts] over safety includes both the plant (equipment and machinery) and operations that constitute the system." (*Brown v. Santa Clara Valley Transportation Agency* (1994) Cal. PUC LEXIS 716; 56 CPUC2d 554, 556.)

As Duncan noted, the *Santa Clara* court's analysis and ruling, noted above, is controlling. In the absence of other statutory or case law, the City, SED, and the CPUC itself are all required to follow the holding of the *Santa Clara* court. Nevertheless, the CPUC may relitigate the jurisdictional issues in this proceeding because nonmutual collateral estoppel cannot be asserted against the government. Neither is there is any horizontal *stare decisis* in the California Court of Appeal.[57] However, in the light of *Santa Clara* and the pleadings submitted in this proceeding by the parties, it is extremely unlikely that the outcome of any relitigation would be any different than the outcome in *Santa Clara*: the CPUC was found *not* to have broad exclusive discretionary authority pursuant to §§ 1201 and 1202 over the location, construction, design, and specifically the grade separation of rail crossings in transit districts; the CPUC was found to have *only* a limited ministerial authority pursuant to § 99152 over safety appliances and procedures and not over the location, construction, design, and grade separation of rail crossings in transit districts.[58]

On January 15, 2016, Prehearing Conference, The ALJ made an oral preliminary ruling granting the City's Motion to Limit the Scope of the Proceeding and denied Duncan's Motion for Interim Ruling on Jurisdictional Issues.

On February 1, 2016, Public Participation Hearing held in Santa Rosa at Helen Lehman School.

On February 5, 2016, The City submitted the Prepared Direct Testimony of Jason Nutt, the City's Director of Transportation and Public Works.

On February 25, 2016 SED submitted the Prepared Direct Testimony of David Stewart, a Utilities Engineer in SED's Rail Crossings and Engineering Branch. Stewart's Testimony cited: the connection between the CPUC's policy on approval of new at-grade rail crossings and

[57] Duncan's Rebuttal Brief, p. 6. *KG v. Meredith* (2012) 204 Cal. App. 4th 164, 172 [nonmutal offensive collateral estoppel is not available against government].
[58] Duncan's Rebuttal Brief at pp. 5-6.

policies of the Association of American Railroads (AAR), an association representing the interests of privately owned railroad companies, which call for a "freeze on the overall number of grade crossings within each state" (p. 4); the CPUC's interpretative requirement that applications for new rail crossings meet a standard of providing absolute safety (p. 7); concerns that approval of the Jennings crossing at-grade would set a bad precedent which would undermine the efforts of the CPUC's staff to restrict the interest in constructing new at-grade crossings in other communities in the State (p. 11-12.).

February 25, 2016, SCTLC, Sierra Club, FOS, and Stephen G. Birdlebough submitted Prepared Direct Testimony from many expert witnesses. Duncan did not present any written testimony.

On March 10, 2016, Duncan filed Motion to Strike Prepared Direct Testimony of David Stewart.

On March 14, 2016, Prehearing Conference, ALJ made an oral ruling and denied Duncan's Motion to Strike.

On March 15-16, 2016 Evidentiary Hearing, Duncan did not present testimony but did cross examine SED's expert witness, David Stewart.

On April 15, 2016 the parties filed Opening Issue Briefs. Duncan's Issue Brief provided citation to official authorities which indicated that there is a long history of freight train traffic in both the rail crossing at issue in *Santa Clara* and the Jennings crossing. That the CPUC had not made an issue of the freight train traffic in the *Santa Clar*a and that, in any event, it would have been irrelevant in the absence of any express statutory CPUC jurisdiction (pp. 1-3.). Duncan's Issue Brief also cited the recent *Monterey Peninsula Water* case for its reaffirmation of the established legal doctrine that the CPUC's jurisdiction over public agencies must be expressly authorized by statute (pp. 4-8.).

On April 29, 2016, Parties submitted Reply Issue Briefs. Duncan's Reply Issue Brief cited David Stewart's testimony: that if a grade-separated crossing can be built, then it must be built regardless of the cost of construction (p. 3.); that the CPUC's interpretation of the Public Utilities

Code produces absurd results, particularly in seeking to close safe at-grade crossings and deny approval of at-grade crossings which can be built to be reasonably safe (p. 6-7.); to illustrate that, in the final analysis, SED's overarching purpose is to enforce a "parallel policy" - a "policy of no new at- grade crossings"[59] - "statewide".[60] There are other communities advocating for creation of pedestrian and bicycle at-grade rail crossings as part of a goal to provide safe alternate routes for convenient and pollution-free transportation, and yet SED recommends denying the City's Application to avoid setting a "bad precedent" for any future applications.[61] (p. 12.)

On July 18, 2016, Proposed Decision Granting City's Application for At-Grade Crossing was published.

On August 8, 2016, Parties submitted Opening Comments on Proposed Decision.

On August 15, 2016, Parties submitted Reply Comments on Proposed Decision .

On September 13, 2016, Revised Proposed Decision was published but not served on parties.

On September 15, 2016, Revised Proposed Decision was adopted by the Commission.

On September 20, 2016, Decision 16009-002 was mailed to the Parties.

IV. Discussion

The Decision is in error in that it does not follow the direction given in Issue #5 in the Scoping Memo:

> 5. In view of the holding in *Santa Clara Valley Transportation Authority v. Public Utilities Commission of the State of California*, does the Commission have jurisdiction over the Jennings Avenue crossing? (Scoping Memo, at p. 4.)

[59] Transcript, p. 199, lines 13-15.
[60] Transcript, p. 194, lines 9-27.
[61] Stewart's Testimony, p. 11, line 26-28 & p. 12, line 1-2.

The correct determination of the issues of law underlying Issue #5 should be consistent with the holding in *Santa Clara*. In view of *Santa Clara*, the jurisdictional dispute is over the extent of the CPUC's jurisdiction over the Jennings crossing, which is in a public transit district.

The Decision is in error in that it interjects an initial mistaken premise, that Duncan, in reliance on *Santa Clara*, asserts a total lack of any CPUC jurisdiction over the Jennings crossing: "In his Response, and throughout this proceeding, Duncan has asserted that the Commission does not have jurisdiction over the crossing." (Decision, p. 12.) As discussed above, Duncan repeatedly tried to correct this mistaken premise. In addition to the effort to correct this mistaken premise in Duncan's briefs, cited above, this mistaken premise was pointed out to the ALJ during the Prehearing Conference, January 15, 2016.[62]

The Decision then attempts to rebut that mistaken premise with yet another mistaken premise, that Issue #5 can be resolved with an academic recital of statutes which may or may not be relevant to the CPUC jurisdiction over all crossings in private and publicly owned rail lines combined in all of California (Decision, p. 12):

> Pursuant to Section 1201 of the California Public Utilities Code (Pub. Util. Code), ... the Commission must grant permission before an at-grade crossing can be constructed across the track of a railroad corporation.
>
> Section 1202 gives the Commission exclusive authority to determine the point of crossing, the terms of installation, and the terms of operation. As part of this authority, the Commission is tasked with evaluating proposed warning devices, technology and other safety measures, with the consent of the local jurisdiction. (Section 1202(d)).
>
> The basis of the Commission's jurisdiction is not limited to Sections 1201 and 1202. Section 229 defines railroad to include any "commercial, interurban, and other railway, other than a street railroad." Under Section 99152, "Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulations of the Public Utilities Commission relating to safety appliances and procedures." *These statutes, when read together, give the Commission jurisdiction over railroad crossings in California.* (Italics added.)

[62] Transcript, Prehearing Conference, January 15, 2016, p. 33, line11 through p. 34, line 11.

This mistaken premise is repeated (Decision, p. 14):

> Finally, as noted above, the Commission's jurisdiction over the crossing is not premised just on Sections 1201 and 1202. Rather, the Commission is responsible for a number of different rail safety laws that, *when read together, establish the Commission's jurisdiction.* (Italics added.)

However, as detailed above, the issue was not whether the CPUC had any jurisdiction at all over the Jennings crossing; the issue in *Santa Clara* and the issue in this Proceeding is the scope of the CPUC's jurisdiction over crossings in publically owned and governed public transit districts, such as the Jennings crossing. The academic recital of the statutory basis of the CPUC's jurisdiction over all California crossings, both public and privately owned, is not relevant in view of *Santa Clara*.

This error in the Decision is reviewable pursuant to: (§ 1757 (a) (2).) (*Great West Contractors v. Irvine Unified School Dist.* (2010) 187 Cal. App. 4th 1425, 1459-1460 [decision based on a mistaken premise is an abuse of discretion].); (§ 1757 (a) (2).) *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 365-366 ["In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law."].); (§ 1757 (a) (1).) *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 365 [CPUC has no jurisdiction pursuant to §§ 1201 and 1202 in transit districts, only limited jurisdiction over safety appliances and procedures pursuant to § 99152].)

The Decision is in error in that it is based upon a mistaken premise and a misinterpretation of controlling statutes and appellate case law construing those statutes. It erroneously states (Decision, p. 12):

> These statutes,[§§ 1202 and 1202, § 99152, and § 229] *when read together*, give the Commission jurisdiction over railroad crossings in California. (Italics added.)

It also erroneously states (Decision, p. 14):

> Finally, as noted above, the Commission's jurisdiction over the [Jennings] crossing is *not premised just on Sections 1201 and 1202*. Rather, the Commission is responsible for a number of different safety laws that, *when read together*, establish the Commission's jurisdiction. (Italics added.)

However, §§ 1202 and 1202, § 99152, and § 229 cannot be "read together" to provide the CPUC with an all-encompassing jurisdiction over transit district rail crossings. As detailed above, the court's holding in *Santa Clara* establishes that §§ 1202 and 1202 do not apply to any transit district. Section 99152, which is in a separate section of the Public Utilities Code,[63] only applies to "public transit guideways" not to privately owned railroads. Section 229 provides only a general definition of "Railroad" and has no relevance to CPUC jurisdiction – it does not mention the CPUC nor does it expressly provide the CPUC with any jurisdiction at all, much less any over transit districts.

The Decision's erroneous premise that §§ 1202 and 1202, § 99152, and § 229 can be "read together" to provide an all-encompassing jurisdiction is rebutted by its own observation that the *Santa Clara* court, " ... found that the Commission does not have exclusive jurisdiction over the VTA crossing pursuant to Sections 1201 and 1202." (Decision, p. 13.)

This error in the Decision is reviewable pursuant to: (§ 1757 (a) (2).) (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal. App. 4th 359, 393-394, [action outside of the applicable legal principles is outside the scope of discretion and is an "abuse of discretion"].) (*Great West Contractors v. Irvine Unified School Dist.* (2010) 187 Cal. App. 4th 1425, 1459-1460 [decision based on a mistaken premise is an abuse of discretion].); (§ 1757 (a) (2).) *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 365-366 ["In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law."].); (§ 1757 (a) (1).) *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 350 [court rejected CPUC assertion of concurrent jurisdiction pursuant to both §§ 1202-1202 and § 99152].)

The Decision is in error in that it is based upon a mistaken premise and a misinterpretation of statutes and appellate case law construing those statutes, i.e., that the CPUC has inherent jurisdiction over publicly owned and governed public agencies, such as transit districts which

[63] § 99152 is located in the Public Utilities Code at Division 10, Transit Districts, Part 11, Provisions Applicable to all Public Transit, Chapter 3, Miscellaneous, §§ 99150-99172. 99152 and only applies to Public Transit.

must first be "altered" to limit CPUC jurisdiction. The Decision states:

> The *Santa Clara VTA* holding is specific to VTA and cannot be applied directly to SMART. The *Santa Clara VTA* court based its decision on analysis of VTA's enabling legislation. Based on this review, the Court *found that the enabling legislation altered the scope of the Commission's jurisdiction over VTA*. (Italics added.) (Decision, p. 13.)

However, the *Santa Clara* court did not find *"that the enabling legislation altered the scope of the Commission's jurisdiction over VTA".* The Decision does not provide any specific citation to *Santa Clara* nor can such a citation be made. As was noted in Duncan's Opening Brief, p. 4, "The *Santa Clara* court continued, ' ... given the statutory basis of the disputed jurisdiction, resolution of this case turns on the issue of statutory interpretation and legislative intent. The important question in this case is whether the Legislature intended for sections 1201 and 1202 to apply to the transit district (VTA).'" The *Santa Clara* court studied the VTA's enabling legislation in the context of resolving issues of statutory interpretation and legislative intent. The *Santa Clara* court did not cite any inherent CPUC jurisdiction which was "altered". It is established law that CPUC jurisdiction is limited to regulation of privately owned public utilities. (*Santa Clara* at p. 356.) Further, as was also noted in Duncan's Opening Brief, at p. 4, "The CPUC has no jurisdiction over publicly owned public utilities or common carriers unless expressly provided by statute. (*Santa Clara* at p. 356.)"

This error in the Decision is reviewable pursuant to: (§ 1757 (a) (2).) (*Santa Monica Properties v. Santa Monica Rent Control Bd.* (2012) 203 Cal. App. 4th 739, 748, 751 [decision reversed because controlling statute and appellate case construing statute were misinterpreted].) (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal. App. 4th 359, 393-394, [action outside of the applicable legal principles is outside the scope of discretion and is an "abuse of discretion"].); (§ 1757 (a) (2).) *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 365-366 ["In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law."].); (§ 1757 (a) (1).) *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 365 ["in the absence of an express provision, we will not infer a legislative intent to confer PUC jurisdiction over a transit district"].)

The Decision erroneously states that "the *Santa Clara VTA* holding is specific and limited to VTA and cannot be directly applied to SMART." (Decision, p. 13.) The Decision also erroneously states that "*San Mateo VTA* [sic] [is] a case that is very specific to a single transit agency and factually different from the case at hand ... ." (Decision, footnote 23, p. 13.) As noted in Duncan's Opening Brief, p. 5, and as detailed above, the *Santa Clara* case could have been considered technically moot. Nevertheless, the court exercised its discretion "to resolve this jurisdictional dispute since it is a matter of continuing public importance and the issue is likely to recur with respect to ... other public entities ... throughout the state." (*Santa Clara* at p. 355.) The *Santa Clara* court intended to resolve the issue for all public transit agencies. The *Santa Clara* court reviewed the case as a matter of law under the appellate independent review standard and so the case did not involve any resolution of disputed facts. There are no disputed factual issues regarding the jurisdictional dispute in this Proceeding. In view of *Santa Clara*, the Decision is in error in asserting that *Santa Clara* is specific to the VTA or that there are any disputed factual issues involved in this Proceeding.

This error in the Decision is reviewable pursuant to: (§ 1757 (a) (2).) (*Santa Monica Properties v. Santa Monica Rent Control Bd.* (2012) 203 Cal. App. 4th 739, 748, 751 [decision reversed because controlling statute and appellate case construing statute were misinterpreted].) (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal. App. 4th 359, 393-394, [action outside of the applicable legal principles is outside the scope of discretion and is an "abuse of discretion"].); (§ 1757 (a) (2).) *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 365-366 ["In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law."].); (§ 1757 (a) (1).) *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 365 [technically moot case reviewed and resolved as a matter of continuing public importance where the issue is likely to recur with respect to other public entities throughout the state].)

The Decision is in error in that it is based upon a mistaken premise and a misinterpretation of statutes and appellate case law construing those statutes. The Decision states:

> The *Santa Clara VTA* court based its decision on analysis of VTA's enabling legislation. Based on this review, the Court found that the *enabling legislation altered the scope of the Commission's jurisdiction over VTA*. *No party has provided an analysis of how or why SMART's enabling legislation,* enacted in 2002 should be subject to the court's interpretation of the 1969 VTA enabling legislation. [Footnote 23 - *Duncan does describe how he would apply the holding of San Mateo VTA [sic] to SMART ...* .] (Italics added.) (Decision, p. 13-14.)

As detailed above, Duncan did provide extensive briefing regarding the VTA's enabling legislation, SMART's enabling legislation, and the enabling legislation of other transit districts which form a statutory scheme in the Public Utilities Code. However, the Decision is erroneous in view of *Santa Clara* and the holding in the more recent *Monterey Peninsula Water* case discussed above. As detailed above, Duncan did provide extensive briefing in this Proceeding which cited long established law that CPUC has no jurisdiction over public agencies, such as SMART, except as expressly provided by statute. (Duncan's Opening Issue Brief, pp. 4-6.) In *Monterey Peninsula Water* the Supreme Court reaffirmed its holding in *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154 (*Monterey Peninsula Water*, *supra*, at p. 698.):

> Created by the California Constitution, the Public Utilities Commission has exclusive jurisdiction to supervise and regulate public utilities. (Pub. Util. Code, §§ 701-853, 1001, 1002, 2101.) It has no authority, however, to regulate public agencies ..., absent a statute expressly authorizing such regulation. (See *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 166-167 (*County of Inyo*).)

The Decision is based on the erroneous premise that a transit district requires enabling legislation which "alters the scope of the Commission's jurisdiction", i.e., removes or limits an omnipresent CPUC jurisdiction. The overarching law, cited above, is that the CPUC does not have inherent jurisdiction over any public agencies, including transit districts; it has jurisdiction only as expressly provided by statute. Because they are public agencies, even if the VTA, SMART, or any other transit district were, for purposes of argument, without any specific enabling legislation, the CPUC still would not have any jurisdiction over any transit district unless it was expressly granted by statute.

This error in the Decision is reviewable pursuant to: (§ 1757 (a) (2).) (*Santa Monica Properties v. Santa Monica Rent Control Bd.* (2012) 203 Cal. App. 4th 739, 748, 751 [decision reversed because controlling statute and appellate case construing statute were misinterpreted].) (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal. App. 4th 359, 393-394, [action outside of the applicable legal principles is outside the scope of discretion and is an "abuse of discretion"].); (§ 1757 (a) (2).) *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 365-366 ["In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law."].); (§ 1757 (a) (1).) *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 356 [CPUC has no jurisdiction over public agencies except as expressly provided by statute].) (*Monterey Peninsula Water Management District v Public Utilities Commission of the State of California* (2016) 62 Cal.4th 693, 698 [CPUC has no authority to regulate public agencies absent a statute expressly authorizing such regulation].)

The Decision is in error in that it is based upon a mistaken premise as well as a misinterpretation of statutes and the appellate case law construing those statutes. The Decision erroneously concludes that "*Santa Clara* VTA does not impact the Commission's jurisdiction over the proposed Jennings crossing" (Conclusions of Law #1, p. 40) and that "As a matter of policy the Commission disfavors new at-grade crossings" (Conclusions of Law #7, p. 41). To the contrary, however, as Duncan has previously asserted, based on the court's holding in *Santa Clara* as well as *Monterey Peninsula Water:*

> The impact of the *Santa Clara* court's ruling on CPUC jurisdiction over rail crossings in transit districts, such as SMART, is profound. Under *Santa Clara*, [and *Monterey Peninsula Water*] any, but not limited to, of the following which are based on §§ 1201 and 1202 do not apply to rail crossings [such as Jennings crossing] in transit districts: California case law; all CPUC General Orders; CPUC Rules of Practice & Procedure; and CPUC Policies as well as CPUC ALJ case law. (Duncan's Opening Brief on Jurisdictional Issues, p. 3.)

The CPUC's incorrect assertion of exclusive jurisdiction[64] over the Jennings crossing has had and continues to have harmful actual impacts on the people of Santa Rosa; it is the basis of an extended delay in the construction of the Jennings crossing and the associated unnecessary costs to the taxpayers. The City's pedestrians and bicyclists have lost the use of the Jennings crossing for over ten months now since the CPUC ordered it barricaded with a fence during the course of this proceeding. If the CPUC had initially acted correctly, almost five years ago, within the scope of its limited statutory ministerial jurisdiction, the construction work to improve the Jennings crossing would have long since been expeditiously and economically completed with a minimum of disruption to the people of Santa Rosa and to SMART. The Decision erroneously upholds, contrary to established law, the CPUC's incorrect assertion of exclusive jurisdiction and fails to acknowledge the consequences of that incorrect action. SED agrees that this jurisdictional issue is not only a local issue for this specific crossing, but is an issue of statewide interest likely to recur in other communities.[65] This jurisdictional issue has been fully briefed by the parties with a considerable investment of time and attention, but in spite the extensive briefing, this Decision, as discussed above, acts outside of applicable law and does not provide a resolution that is consistent with statutory and decisional law.

This error in the Decision is reviewable pursuant to: (§ 1757 (a) (2).) (*Santa Monica Properties v. Santa Monica Rent Control Bd.* (2012) 203 Cal. App. 4th 739, 748, 751 [decision reversed because controlling statute and appellate case construing statute were misinterpreted].) (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal. App. 4th 359, 393-394, [action outside of the applicable legal principles is outside the scope of discretion and is an "abuse of discretion"].); (§ 1757 (a) (2).) *City of Marina v. Bd. of Trustees* (2006) 39 Cal. 4th 341, 365-366 ["In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law."].); (§ 1757 (a) (1).) *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 356 [CPUC jurisdiction in transit districts in limited to only oversight of safety appliances and procedures pursuant to § 99152].) (*Monterey Peninsula*

[64] The CPUC's incorrect assertion of exclusive jurisdiction pursuant to §§ 1201 and 1202, CPUC General Order 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings, and CPUC Rule Section 3.7(c).
[65] Transcript, Evidentiary Hearing, March 14, 2016, page 194, lines 9-28.

Water Management District v Public Utilities Commission of the State of California (2016) 62 Cal.4th 693, 698 [CPUC has no authority to regulate public agencies absent a statute expressly authorizing such regulation].)

The Decision is in error procedurally, in that the CPUC violated Rule 14.1(d)(2) and § 311 (e). Consequently, it did not proceed in the manner required by law. On September 13, 2016, late in the day, a Revised Proposed Decision in A15-05-014, which was not served, was published by the CPUC.

An addition in the Revised Proposed Decision, in Section 6.3.1.2, Convincing Showing that the City has Eliminated all Potential Safety Hazards, p. 30, states:

> In addition to the safe design of the at-grade crossing, a crossing guard during school hours could provide additional protection for school children. For this reason, this decision directs the City to work with the school district to determine if a crossing guard should be located at the crossing. The City is directed to provide a report on the crossing guard analysis to SED as part of City's compliance with this decision.

Another addition in the Revised Proposed Decision is Conclusion of Law No. 12, p. 41, states:

> The City should work with the school district to determine if a crossing guard should be located at the crossing.

A further addition, to Order No. 5, p. 42, states:

> The completed [CPUC Standard Form G] must include a report on whether a crossing guard should be stationed at the crossing during school hours.

The above addition to Order No. 5 in the Revised Proposed Decision is critical, because Order No. 5, p. 42, also provides that:

> Authorization shall expire ... if the above conditions are not satisfied. Authorization may be revoked or modified if public convenience, necessity or safety so require.

None of the additions set forth above were suggested in prior comments by any Party. In fact, a comprehensive review of the complete record, i.e., the briefs submitted and the transcripts in A15-05-14, confirm that neither the Parties nor the ALJ had ever discussed a requirement that the City provide any analysis of a need for school crossing guards at the Jennings crossing.

On September 15, 2016, before the scheduled Voting Meeting, Duncan sent an ex parte e-mail to the CPUC President and Commissioners which detailed these additions and stated:

> The revised Proposed Decision just published is, in fact, an *alternate* Proposed Decision. "A substantive revision to a proposed decision ... is not an 'alternate proposed decision' ... if the revision does no more than make changes suggested in prior comments on the proposed decision ...." (Rule 14.1(d).) However, none of the additions set forth above were suggested in prior comments by any Party. In fact, a comprehensive review of the complete record, i.e., the briefs submitted and the transcripts in A15-05-14, confirm that requiring that the City to provide an analysis of a need for, or to provide, school crossing guards at the Jennings Crossing has never been discussed in the proceeding by the Parties or the ALJ.
>
> An "alternate proposed decision" is a substantive revision to a proposed decision which makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs. (Rule 14.1(d)(2), Pub. Util. Code § 311, subd. (e).) The additions to the Proposed Decision set forth above meet this criteria and consequently it is actually an "alternate proposed decision" and as such requires an additional 30-day review and comment period. (Rule 14.1(d), Pub. Util. Code § 311, subd. (e).)

The CPUC, consistent with Rule 14.1(d) and Public Utilities Code § 311 (e), must provide the additional 30-day review and comment period regarding the added requirements, detailed above. (*Southern California Edison v. Public Utilities Commission* (2006) 140 Cal. App. 4th 1085, 1006-1007 [CPUC violated its own rules in by considering a new issue without providing the parties sufficient time to respond to the new issue].)

V. Conclusion

For the reasons set forth above, James L. Duncan respectfully urges the Commission to grant this Application for Rehearing of Decision 16-09-002, and to issue a new Decision which resolves the jurisdictional dispute regarding the limits to the CPUC's jurisdiction in public transit systems, such as transit districts, such as SMART, consistent with *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* 124 Cal. App. 4th 346 (2004), other authorities cited, and argument submitted by James L. Duncan. Also, Duncan respectfully urges the Commission to recognize that the Revised Decision is in fact an Alternate Proposed Decision and, consistent with Rule 14.1(d) and Public Utilities Code § 311 (e), to provide the required additional 30-day review and comment period regarding the added requirements, detailed above.

Dated this 20th day of October, 2016, at Santa Rosa, California.

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By /s/ *James L. Duncan*
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